

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

EDMOND S. MOSLEY,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBER
PH07528510766

DATE: NOV 20 1986

Dennis L. Friedman, Esquire, Philadelphia, Pennsylvania,
for the appellant.

Robert Campbell, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

OPINION AND ORDER

For the reasons stated below, the Board hereby VACATES the opinion and order issued in this appeal on August 13, 1986, DENIES the appellant's petition for review for failure to meet the criteria for review set forth at 51 Fed. Reg. 25, 158 (1986) (to be codified at 5 C.F.R. § 1201.115),¹ REOPENS the appeal on its own motion pursuant to 5 C.F.R. § 1201.117, and AFFIRMS the initial decision of January 21, 1986.

¹ On July 10, 1986, the Board republished its entire rules of practice and procedure in the Federal Register. For ease of reference, citations will be to the Board's regulations at 5 C.F.R. Part 1201. However, parties should refer to 51 Fed. Reg. 25, 146-72 (1986) for the text of all references to this part.

BACKGROUND

The appellant received a career-conditional appointment to his position as a Police Officer, GS-5, effective May 12, 1980. Regional Office File, Tab 4, SF-50 dated May 14, 1980. He was subsequently given a temporary promotion, effective June 13, 1982, to the position of Motor Vehicle Operator, WG-6. *Id.*, SF-50 dated June 17, 1982. Although the promotion originally was scheduled to expire by June 11, 1983, the agency repeatedly extended it. *Id.*, SF-50s dated June 17, 1982, July 15, 1983, March 14, 1984, July 6, 1984, October 28, 1984, and July 7, 1985. On September 7, 1985, however, the agency returned the appellant to his Police Officer position. Regional Office File, Tab 4, SF-50 dated September 9, 1985.

On appeal to the Board's Philadelphia Regional Office the appellant argued that the agency improperly returned him to his former position without affording him adverse action procedures. Following the appellant's response to an order regarding the Board's jurisdiction to consider the appeal, the administrative judge dismissed the appeal, concluding that the return of an employee to a position from which the agency temporarily promoted him or his reassignment or demotion to a different position that was not at a lower rate or level than the position from which he was temporarily promoted, was not an adverse action subject to the Board's appellate jurisdiction.

In his petition for review of the administrative judge's decision, the appellant contended that: the agency acted improperly in terminating his temporary promotion; the Board's jurisdictional order was inadequate because it did not have sufficient specificity; and the administrative judge improperly failed to assume the truth of appellant's allegations in making her finding regarding the Board's jurisdiction.

Analysis

In the Board's opinion and order of August 13, 1986, reliance was placed on the decision in *Phipps v. Department of Health and Human Services*, 23 M.S.P.R. 486 (1984), to conclude that the termination of a temporary promotion which exceeded two years and the return of the employee to his previous position required adverse action procedures and was appealable to the Board. The United States Court of Appeals for the Federal Circuit, however, in affirming *Phipps*, held that the regulatory provisions of 5 C.F.R. §§ 335.102(f)(1) and 752.401(c)(7) do not require adverse action procedures where a temporarily promoted employee is returned to his or her previous position after having served in the temporary position for more than a two year period. See *Phipps v. Department of Health and Human Services*, 23 M.S.P.R. 486 (1984), *aff'd on other grounds*, 767 F.2d 895, 897 (1985). Thus, the appellant has not been the subject of an adverse action which is appealable to the Board and his appeal must be dismissed for lack of jurisdiction.

ORDER


This is the Board's final order in this appeal. 5 C.F.R. § 1201.113 (b).

NOTICE TO APPELLANT

You may petition the United States Court of Appeals for the Federal Circuit to review the Board's decision in your appeal, if the court has jurisdiction. 5 U.S.C. § 7703. The

address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The court must receive the petition no later than 30 days after you or your representative receives this order.

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.